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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

R. A. V.,

Petitioner,

vs.

ST. PAUL, MINNESOTA,

Respondent.

On Writ of Certiorari to the Minnesota Supreme Court

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Should the overbreadth doctrine be invoked to prevent prosecution of a person whose conduct is both clearly proscribed by the ordinance and clearly within the power of the state to proscribe, when (1) the conduct before the Court lies in an area cleanly severable from the possibly unconstitutional applications, and (2) the state court's construction of the ordinance makes the constitutionality of those other applications a close question.

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION SUPPORTING AFFIRMANCE

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves a claim that even though the government can and has prohibited petitioner's act, prosecution must be precluded in order to effectuate a policy unrelated to the justice of the case before the court. Such misuse of

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1. Both parties have consented in writing to the filing of this brief.

the criminal justice system is contrary to the rights of victims and society which CJLF was formed to advance. CJLF therefore has an interest in this case.

SUMMARY OF FACTS AND CASE

R.A.V. allegedly participated in burning a cross on the yard of a Black family's home in St. Paul, Minnesota. *Matter of Welfare of R.A.V.*, 464 N. W. 2d 507, 508 (Minn. 1991). He was charged with violating St. Paul, Minn. Leg. Code § 292.02 (1990):

> "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

The trial court dismissed the charge "on the ground that the ordinance censors expressive conduct in violation of the first amendment to the United States Constitution." 464 N. W. 2d, at 508. The Minnesota Supreme Court construed the ordinance to limit its prohibition "fighting words," *id.*, at 510 (citing *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942)) and to "conduct that is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' " 464 N. W. 2d, at 510 (quoting *Brandenburg* v. *Ohio*, 395 U. S. 444, 447 (1969)).

As so construed, the state court unanimously held that the ordinance was constitutional. *Id.*, at 511. This Court granted certiorari. *R.A.V.* v. *St. Paul*, 115 L. Ed. 2d 969, 111 S. Ct. 2795 (1991).

SUMMARY OF ARGUMENT

The overbreadth doctrine should be used sparingly, if at all. It is a doctrine of doubtful legitimacy, violating cardinal rules against unnecessary and overly broad constitutional decisions. Furthermore, pronouncement of rules in the absence of concrete factual disputes is unwise and error-prone. The doctrine may actually damage the First Amendment freedoms it is supposed to advance.

In addition to the state court's narrowing construction, federal courts can and should apply partial invalidation. This case involves conduct within a "core of easily identifiable and constitutionally proscribable conduct." Other conduct proscribed by the statute should be left to a case actually presenting the question. Alternatively, the ordinance should be invalidated only to the extent that it applies to placements of symbols on public forum property or on private property with the consent of the owner.

Under either approach, the ordinance should be affirmed to the extent that it prohibits placement of a burning cross on private property without consent of the owner.

ARGUMENT

R.A.V. committed the act.[2] The city *may* constitutionally punish this act. The city *has* passed an ordinance clearly prohibiting and punishing this act. Yet R.A.V. nonetheless claims that the Constitution of the United States prohibits the enforcement of that ordinance in this case.

Such a result would surely strike Jane and John Q. Public as odd, bordering on insane. The logic of the overbreadth doctrine often leads to extremes. See *Lewis* v. *City of New Or-*

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2. More precisely, the allegations are assumed true in the procedural posture of the case.

leans, 415 U. S. 130, 136 (1974) (Blackmun, J., dissenting). When that happens, it is time to reexamine the premises. Common sense is more often right.

I. The overbreadth doctrine is itself overbroad and should be used sparingly, if at all.

The essence of an overbreadth challenge is that even though the party before the court has committed an act which the legislature can and has prohibited, he should nonetheless escape punishment because the same statute may, in other contexts, chill the exercise of First Amendment rights. *Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 634 (1980). By its very nature, such an argument requires the court to deal with hypothetical situations "and pass upon . . . constitutionality . . . as an abstract question." *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). Such a course is unwise and possibly illegitimate.

> "That is not the mode in which this court is accustomed or willing to consider such questions. It has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Ibid.*

Liverpool's statement that the Court has "rigidly adhered" to these rules is no longer true. The overbreadth doctrine routinely involves both advance rulings on constitutionality and the formulation of rules broader than necessary for decision.

These deviations have not gone unnoticed by the Members of the Court. Individual opinions have questioned both the legitimacy and the wisdom of the overbreadth doctrine. See *Lewis* v. *City of New Orleans*, 415 U. S. 130, 136-142 (1974) (Blackmun, J., dissenting); *New York* v. *Ferber*, 458 U. S. 747, 777-781 (1982) (Stevens, J., concurring in the judgment); *Secretary of State of Md.* v. *J.H. Munson Co.*, 467 U. S. 947, 976-978 (1984) (Rehnquist, J., dissenting). Majority opinions have also expressed reservations. See, *e.g.*, *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610-611 (1973).

These reservations are well-founded. If the overbreadth doctrine is not to be abandoned altogether, it should at the very least be kept on a tight leash.

A. The Legitimate Scope of Judicial Review.

Although people speak freely of courts "striking down" statutes, nowhere in the Constitution is such a function assigned to the judicial branch. Instead, the Constitution establishes a hierarchy of laws, and the judiciary must necessarily apply the higher law in preference to the lower one when the laws conflict. That preference is explicit in the case of state statutes, U. S. Const., art. VI, § 2, and implicit in the case of federal statutes.

The legitimacy of judicial review is well established in cases where the constitution and the statute actually command different results in the case before the court. See, *e.g.*, *Bayard* v. *Singleton*, 1 N. C. 15, 18 (1787) (jury trial); *United States* v. *Eichman*, 110 L. Ed. 2d 287, 292, 110 S. Ct. 2404 (1990) (flag burning). In these situations the court must decide whether the statute conflicts with the constitution because and *only* because there is no other way to decide the case.

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

> "So if a law be in opposition to the constitution; *if both the law and the constitution apply to a particular case*, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> "If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern *the case to which they both apply*." *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 177-178 (1803) (emphasis added).

Legitimate judicial review is limited to the necessity of deciding cases, as outlined in *Marbury*. *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611 (1973). That necessity is limited to cases to which "both the law and the constitution apply." If the Constitution does not apply to a case, then the case is governed solely by the statute, and there is no constitutional issue to decide.

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [Citations.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously. [Citation.] These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system *courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws*." *Id.*, at 610-611 (emphasis added).

This is not a matter of policy; this is a matter of the boundaries of the judicial function. It is a matter of usurpation of

"the prerogative of democratic government." *Lewis*, *supra*, 415 U. S., at 140 (Blackmun, J., dissenting).

The overbreadth doctrine is sometimes justified by "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). But does the end justify the means?

Surely no one would contend that a court could reach out and "strike down" a statute on its own initiative, with no case before it at all. The patent illegitimacy of such a decree requires that the statute be tolerated until *someone* brings a challenge. Why can it not be further tolerated until a challenge is brought in a case where the constitutional right in question is *genuinely* at issue?

With modern procedures, there is no need to await a criminal prosecution. See *Munson*, *supra*, 467 U. S., at 977-978 (Rehnquist, J., dissenting). While the cost of declaratory relief is a concern, there appears to be a more than adequate supply of litigation. The panhandlers of New York's subway obtained representation. See *Young* v. *New York City Transit Auth.*, 903 F. 2d 146, 147 (CA2 1990), cert. denied 112 L. Ed. 2d 528, 111 S. Ct. 516 (1991). So did the people in Alexandria, Virginia, who felt threatened by an ordinance proscribing loitering for the purpose of engaging in unlawful drug transactions. See *Northern Va. Chap., ACLU* v. *Alexandria*, 747 F. Supp. 324 (E. D. Va.1990). When the State of Washington passed a "moral nuisance" statute, a complaint was on file within days. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 507 (1985) (O'Connor, J., concurring).

The notion that the First Amendment is suffering from a dearth of litigants seems out of touch with reality. Even if necessity could ever justify an otherwise improper constitutional edict, which is doubtful, a stronger showing of necessity would seem to be needed.

B. Concrete Facts and Wise Decisions.

Even if a court *may* decide cases on hypothetical facts, there remains grave doubt whether it *should*. One of the principal advantages of judicially developed law is that it arises from decisions on concrete facts in cases affecting real people. The justice or injustice of the result therefore influences the development of the rule. This advantage is lost when "the facts are relegated to footnote status, conveniently distant and in less disturbing focus." *Lewis*, *supra*, 415 U. S., at 137 (Blackmun, J., dissenting).

The quality of judicial decision-making is impaired when the decisions are made in a vacuum. Decisions rendered "in concrete factual situations . . . tend to be crafted with greater wisdom." *New York* v. *Ferber*, 458 U. S. 747, 781 (1982) (Stevens, J., concurring in the judgment). Hypothetical rulings, on the other hand, are "inherently treacherous," error-prone, and "qualitatively less reliable." *Id.*, at 781.

C. Collateral Damage.

The invalidation of an entire statute legalizes conduct that the people, through the democratic process, have deemed it necessary to prohibit. It may be true that "if some constitutionally unprotected speech [or conduct] must go unpunished, that is a price worth paying to preserve the vitality of the First Amendment." *Houston* v. *Hill*, 482 U. S. 451, 462, n. 11 (1987). Whether the price is *worth* paying, however, begs the question of whether the price *needs* to be paid.

This Court has been reluctant to apply the overbreadth doctrine where the statute has a substantial number of valid applications. *Parker* v. *Levy*, 417 U. S. 733, 760 (1974). Furthermore, the overbreadth doctrine must be carefully tied to the circumstances warranting its exception to the usual rules of constitutional adjudication. *New York* v. *Ferber*, 458 U. S. 747, 769 (1982). Overbreadth is a "last resort." *Ibid.*

When the legislative branch regulates in the area of fundamental rights, the judiciary admonishes that the least drastic

means must be employed. See, *e.g.*, *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960). The judiciary should heed the same advice. The right of self-government is a fundamental right. See U. S. Const., art. IV, § 4; Declaration of Independence, para. 2 (1776). The overbreadth doctrine should be invoked, if at all, only when no less drastic interference with democratic government is available. That is rarely the case.

The overbreadth doctrine is itself overbroad.

II. The overbreadth doctrine should not be invoked in this case.

A. Partial Invalidation v. Narrowing Construction.

A statute need not be invalidated in its entirety because its literal wording is overbroad. Two separate but related alternatives are available. First, the court with the final authority to construe the statute may give it a narrower meaning than the literal wording would indicate. See *Osborne* v. *Ohio*, 109 L. Ed. 2d 98, 111-112, 110 S. Ct. 1691, 1698 (1990). Second, the court which must decide the validity may, in many cases, decide that the statute is only partially invalid. *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985).

These two alternatives implement the twin principles set forth in *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885): "one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."[3] Narrowing construction avoids the need for a constitutional decision; partial rather than full invalidation avoids excessive breadth of the constitutional rule.

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3. These are "cardinal rules governing the federal courts." *Brockett*, 472 U. S., at 501.

When a state statute is involved, the responsibility for the decision is divided. The construction of the statute is ultimately the responsibility of the highest state court, and that court's construction is binding on the federal courts. *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982). The necessity of invalidation for overbreadth, however, is a federal question. *Id.*, at 767.

In the present case, the Minnesota Supreme Court has both authoritatively construed the ordinance and concluded that the construction satisfies the First Amendment. R.A.V. urges this Court to disagree with the latter ruling. Even if he wins this point, however, he is not home free. *Brockett* clearly requires that a federal court entertaining an overbreadth challenge consider the less drastic measure of partial invalidation. 472 U. S., at 507.

B. The Marbury Principle.

Partial, rather than full, invalidation is not only the norm today, see *Brockett*, *supra*, 472 U. S., at 502, it has been the norm from the very beginning. The issue in *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137 (1803) centered on the mandamus clause of section 13 of the Judiciary Act of 1789. 1 Stat. 58; see 1 Cranch, at 148, 173. In *Marbury*, as every lawyer knows, Chief Justice Marshall determined that clause to be inconsistent with the Constitution in the case presented, 1 Cranch, at 176, and then pronounced "that an act of the legislature, repugnant to the constitution, is void." *Id.*, at 177.

Yet the entire Judiciary Act was not void. Section 13 was not void. Not even the mandamus clause was void. The Supreme Court retained the power to issue writs of mandamus in aid of its appellate jurisdiction. *Ex parte Peru*, 318 U. S. 578, 582-583 (1943). The statute declared "void" in *Marbury* continued in force to the extent that it did not conflict with the Constitution.

This conclusion follows from the underlying rationale of *Marbury*. See *ante* pp. 5-6. Judicial review is only proper when both the Constitution and the statute apply to the case.

1 Cranch, at 178. In a case where only the statute applies and the Constitution is silent, the statute remains in force. Cf. *Osborne*, *supra*, 109 L. Ed. 2d, at 117, 110 S. Ct., at 1703 (rejecting contention that overbroad statute is a nullity).

The general rule, therefore, is "that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett*, *supra*, 472 U. S., at 502. *Brockett* flatly rejected the contention that First Amendment cases are exempt from this rule. *Ibid.*

C. Severable, Nonseverable, and Amorphous Statutes.

There are some statutes which, by their nature, do not lend themselves to partial invalidation. There may be cases where the legislature would not have wanted "its legislation to stand at all unless it could validly stand in its every application." *United States* v. *Raines*, 362 U. S. 17, 23 (1960). Such cases are rare. *Ibid.*; see also *Brockett*, *supra*, 472 U. S., at 506-507. In the present case, R.A.V.'s conduct is at the very core of the evil to which the ordinance is addressed.

A second type of statute is the one which is so amorphous that no lines of severability are discernable. The regulation in *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus*, 482 U. S. 569 (1987) is the ultimate example. The governing board of Los Angeles International Airport sought to ban all "First Amendment activities in the airport." *Id.*, at 570-571. The Court's discussion of the implausibility of a narrowing construction, *id.*, at 576, applies equally to the implausibility of a partial invalidation. There is no good place to draw a line.

Mechanical severability is conducive to partial invalidation,[4] but it is not required, as *Marbury* has illustrated from the

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4. In *Sable Communications* v. *FCC*, 492 U. S. 115, 124, n. 6 (1989), *Sable* originally claimed "indecent" was not severable from "obscene," but dropped that claim when Congress split the two grounds of prohibition into separate subsections.

beginning.[5] *Brockett* makes clear that even in the First Amendment context, a statute can be invalidated as to some applications and left standing as to others without carving specific words out of the statute. Focusing on the single word "lust" in a moral nuisance statute, *Brockett* held that "[u]nless there are countervailing considerations, the Washington law should have been invalidated only insofar as the word 'lust' is to be understood as reaching protected materials." 472 U. S., at 504. The Court rejected a lower court holding that separation of valid and invalid applications of this single word was not feasible. *Ibid.*

D. Severance by Location.

The wording of the legislation is always a good starting point. "Whoever places *on public or private property* a symbol, . . . , including, but not limited to, *a burning cross* . . . shall be guilty of a misdemeanor." St. Paul, Minn. Leg. Code § 292.02 (emphasis added).

When examining the range of application of this ordinance, one obvious place to look is the location of the placement.[6] The First Amendment implications of prohibiting the placement of symbols are quite different for different locations.

1. Consensual placements.

First, there is placement of a symbol on one's own property or on another's property with the consent of the owner.[7] It is difficult to see any constitutional applications of the statute in this area. Beyond question, the Nazis can paint a swastika on their own headquarters, however offensive civilized people

5. See *ante* at 10.

6. Indeed, petitioner begins his analysis with location. Pet. Brief, part I B 1.

7. For brevity, amicus uses "owner" to mean the person presently entitled to possession, who may be a tenant.

may find it. Similarly, the Ku Klux Klan can burn a cross at its own rally on its own or its members' property, subject only to content-neutral fire regulations.

As construed by the Minnesota Supreme Court, however, the ordinance may not apply to such placements. "Fighting words," by definition, are words "likely to cause an *average* addressee to fight." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 573 (1942) (quoting *State* v. *Chaplinsky*, 18 A. 2d 754, 762 (1941)) (emphasis added); see also *id.*, at 574 ("provoke the average person to retaliation"). It is difficult to imagine any consensual placements of symbols on private property which qualify. If such a category exists and if it is deemed protected speech despite *Chaplinsky*, there is no difficulty in partially invalidating the ordinance as to consensual placements on private property.

2. Trespassory placements.

At the other end of the spectrum are trespassory placements on private property, *i.e.* without consent of the owner. This category, considered separately, raises no First Amendment concerns. There is no First Amendment right to trespass on genuinely private property. See *Hudgens* v. *NLRB*, 424 U. S. 507, 520-521 (1976.)[8]

The argument that the classification in this ordinance is content-based is meritless. Once the conduct or speech falls outside the protection of the First Amendment, it is properly subject to content-based regulation. *New York* v. *Ferber*, 458 U. S. 747, 765-766, n. 18 (1982) ("kiddie porn"); see also *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413

8. There is a very narrow exception for property which is effectively public and thus properly considered in the next category. See *id.*, at 516-517 (quoting *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U. S. 308, 330-332 (1968) (Black, J., dissenting)). Also, a state may adopt a broader definition of this exception. *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980).

U. S. 376 (1973) ("male help wanted").

Murder can be a form of expressive conduct. If a person commits murder for the purpose of publicizing his message of racial hatred, a state can constitutionally consider that purpose in assessing the punishment. *Barclay* v. *Florida*, 463 U. S. 939, 949-951 (1983) (plurality); *id.*, at 970-971 (Stevens, J., concurring in the judgment);[9] see also Cal. Pen. Code § 190.2(a)(16).

Once the act is properly defined as criminal, society may take the content into account in determining the degree of harm done and classifying the crime accordingly. The physical damage may be the same as if R.A.V. had built a campfire and toasted marshmallows, but the psychological harm to the victims is far greater.

Society as a whole also suffers a different kind of harm from a "hate crime," beyond the harm inflicted by an ordinary assault or trespass. Crimes such as this one inflame racial tensions and impede the integration of housing and schools. Indeed, the latter effect is very often the motive of the crime.

It is no defense to rape that the act could be punished as assault and battery. It is no defense to robbery that the act could be punished as grand theft. The psychological harm in each case makes the crime qualitatively different, and society is entitled to classify the crime differently. So, in this case, the question of whether R.A.V.'s act is also assault[10] or a criminal trespass is no constitutional impediment to the enforcement of this ordinance.

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9. Barclay's counsel did not have the effrontery to raise a First Amendment claim. Amicus cites the case as a factual example rather than a precedent.

10. R.A.V. is also charged with bias-motivated assault under Minn. Stat. § 609.2231, subd. 3. See Pet. Cert. 3. The intent to cause fear of *immediate* bodily harm, see Minn. Stat. § 609.224 subd. 1 (defining assault), may not be present in this case. Cross-burning is generally a threat of future bodily harm.

In short, a clean, clear line of division separates this category of conduct from other conduct arguably covered by the ordinance, and the ordinance is clearly constitutional as applied to this category. There *is* a "core of easily identifiable and constitutionally proscribable conduct that the [ordinance] prohibits." Cf. *Secretary of State of Md.* v. *J.H. Munson Co.*, 467 U. S. 947, 965-966 (1984). A trespassory placement of a burning cross or a Nazi swastika on private property is both clearly proscribed[11] and unquestionably proscribable. It also happens to be the conduct at issue in this case.

3. Public Property.

Leaving the clear areas behind, we press onward into the fog. Can this ordinance, limited by construction to "fighting words," constitutionally restrict the placement of swastikas, burning crosses, and possibly other symbols on public property, including public forums?

The question is not an easy one. "Fighting words," unfortunately, still exist in our society. Rallies by the Ku Klux Klan and by groups on the opposite extreme do, in fact, result in violence. See, *e.g.*, Jordan and Wheeler, "14 Hurt as Anti-Klan Protesters Clash with Police," Washington Post, Oct. 29, 1990, at A1, col. 2.

On the other hand, rallies go to the very core of First Amendment freedom. If *Chaplinsky* really prohibits use of these symbols in rallies, modification of its rule may well be in order.

E. Overbreadth and the Present Case.

At this point, past protests about the overbreadth doctrine strike a strong, resonant chord. Should difficult questions

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11. The ordinance has vagueness problems as applied to other symbols. R.A.V. has no standing to complain of this vagueness. *Parker* v. *Levy*, 417 U. S. 733, 756 (1974).

about public forums be answered in a case centered on a family's front lawn, with the actual facts of the case "relegated to footnote status"? See *Lewis* v. *City of New Orleans*, 415 U. S. 130, 137 (1974) (Blackmun, J., dissenting). Should this Court expound upon the "fighting words" doctrine "in the context of imaginary events," *ibid*., rather than what really happened here? This Court has previously insisted that "fighting words" determinations require "careful consideration of the actual circumstances surrounding [the] expression. . . ." *Texas* v. *Johnson*, 491 U. S. 397, 409 (1989).

Overbreadth analysis is touted as more protective of the First Amendment, but it is not necessarily so. A holding that a statute is not overbroad may cut off whole categories of expressive conduct from the protection of the First Amendment without consideration of individual cases. *New York* v. *Ferber*, 458 U. S. 747, 780 (1982) (Stevens, J., concurring in the judgment). Affirming the Minnesota Supreme Court's rationale as well as its judgment could easily have the effect Justice Stevens warned of. It is far better, amicus submits, to adopt Justice Stevens' recommendation and resolve these questions only in concrete factual situations. *Id*., at 781.

In the present case, this can be done by considering the public and private property applications of the statute separately. Invalidity of one, even on overbreadth grounds, need not bring down the other. See *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 502 (1985). Why, then, should this Court unnecessarily decide a question of constitutional law in advance, violating a cardinal rule governing federal courts? See *id*., at 501.

The proper approach, amicus suggests, is this. Where the range of conduct covered by the statute is divisible into one region of clearly proscribable conduct, which includes the conduct before the Court, and another region presenting difficult questions, the case is not a proper one for the application of the overbreadth doctrine. The statute should be upheld as applied, and the questionable applications left for decision in a case which actually presents them. Amicus further submits that the present case falls in this category.

Alternatively, if the Court determines that this is a proper case for application of the overbreadth doctrine, and if the Court determines that the narrowing construction by the Minnesota Supreme Court is insufficient, then the partial invalidation rule of *Brockett* should apply. If the ordinance is invalid as to consensual placements on private property and placements not amounting to vandalism on public forum property, it is nonetheless clearly valid as to trespassory placements on private property. Therefore, under *Brockett*, it should be partially invalidated as far as necessary to cure the overbreadth, and no further.

CONCLUSION

The judgment of the Supreme Court of Minnesota should be affirmed.

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Respectfully submitted,

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